NO. 86-823

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MOBIL OIL CORPORATION, Petitioner,

v.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

All courts below assumed, for purposes of ruling on summary judgment and on three certified questions arising therefrom, that the disputed lands in this quiet title action were and are sovereignty (equal footing) lands which passed to the State at statehood.

1. Whether determinations as to the character of land under the Swamp and Overflowed Lands Act of 1850, 43 U.S.C. § 982 et seq., are, as a matter of federal law, conclusive against the State and the State's Trustees with respect to its sovereignty lands in quiet title actions brought by a private claimant.

2. Whether a State judicial decision, which holds, as a matter of state law, that the State's Trustees' swamp and overflowed lands deeds to pri-

vate parties do not include the State's sovereignty lands below the high water mark of navigable rivers, contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of Florida are listed in the caption. Pet. ii. Petitioner Mobil Oil Corporation is a subsidiary of Mobil Corporation. Id. Respondent Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, consists of seven trustees (the Governor, Secretary of State, Attorney General, Comptroller, State Treasurer, Commissioner of Education, and Commissioner of Agriculture, and their successors in office). Fla. Stat. §253.02(1) (1985). The State of Florida and the Florida Department of Natural Resources, named defendants in the trial court, are real parties in interest. Pet. App. 42a. See Fla. Stat. §253.001, (1985). See generally App. D, infra, 66a n.1.

"Coastal Petroleum was a defendant in the Florida trial court but did not perfect an appeal of the final judgment in favor of Mobil Oil Corporation." Pet. ii.

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OPINIONS BELOW

The opinion of the Florida Supreme Court (Pet.App. 1a-20a) is reported sub nom. Coastal Petroleum Co. v. American Cyanamid Co. at 492 So.2d 339. The opinion of the Florida District Court of Appeal, Second District (Pet.App. 25a-

33a), styled Board of Trustees of Internal Improvement Trust Fund v. Mobil Oil Corp., is reported at 455 So.2d 412 and adopts by reference (at Pet.App. 33a) that court's opinion in a connected case, Coastal Petroleum Co. v. American Cyanamid Co., (Pet.App. 34a-41a), which is reported at 454 So.2d 6. The opinion of the Florida Circuit Court for Polk County on summary judgment (Pet.App. 42a-51a), styled Mobil Oil Corp. v. Coastal Petroleum Co., is reported at 2 Fla.Supp.2d at 12.[1]

JURISDICTION

The decision of the Florida Supreme Court, remanding this case for further proceedings in the lower Florida

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[1] Vacated in its entirety as to State defendants in accordance with mandate, but remains in force as to Coastal Petroleum Co., No. GC-G-82-1089 (Fla. 10th Cir. Ct. Sep. 30, 1986). The case is presently set for trial in March, 1987.

courts, was rendered on May 15, 1986, and a motion for rehearing (Pet.App. 52a-64a) was denied on August 27, 1986 (Pet.App. 22a). The judgment of the Florida Supreme Court was entered August 27, 1986 (Pet.App. 23a). The petition for a writ of certiorari was filed on November 20, 1986. 55 U.S.L.W. 3412. This Court's jurisdiction is purportedly invoked under 28 U.S.C. §1257(3). See Pet. 2, 15-25. For the reasons set forth below, none of the requirements necessary to invoke this Court's jurisdiction under 28 U.S.C. §1257(3) is satisfied here.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition sets forth certain provisions of the Swamp Lands Act of 1850, 43 U.S.C. §982 et seq. The petition omits the 1845 Act of Statehood for Iowa

and Florida, which provides in pertinent part:

> That the States of Iowa and Florida be . . . declared to be States of the United States of America, and are hereby admitted to the Union on equal footing with the original states, in all respects whatsoever.

5 Stat. 742 (1845).

Section 197.228(2), Florida Statutes (1981), is reproduced at App. A, infra, 1a. This statute was quoted and relied on in the trial court and district court of appeal. See Pet. App. 6a, 37a, 47a. That section, originally adopted in 1953, Ch. 28262, §1, Laws of Florida (1953), is now renumbered Section 253.141(2), Florida Statutes (1985). See, e.g., Pet. App. 61a.

Section 1257(3) of 28 U.S. Code is reproduced at App. B, infra, 2a.

STATEMENT

The facts of this case ("Mobil IV") are generally set forth in the three decisions below. Pet. App. 1a-51a. For purposes of this Court's jurisdictional inquiry, the State accepts the summary of the facts in the decision below.[2] Particular attention is drawn

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[2] This case is one of a series of connected cases spanning ten years of litigation. "The present controversy was provoked by litigation in 1976 in a different Florida Circuit Court (for Leon County) between petitioner and a mineral lessee from the State, Coastal Petroleum Company." Pet. 9. As the District Court of Appeal below noted, "The title issues presented by Mobil's reply counterclaim in the Leon County Circuit Court case [filed in 1979] are the same as those involved in. . . [this] Polk County Circuit Court action. . . ." Pet. App. 27a. See also Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir.), cert, denied 459 U.S. 970 (1982). App. C, infra, 3a-61a ("Mobil I"). See generally Coastal Petroleum Co. v. International Minerals & Chemical Corp., TCA 77-0946, TCA 77-0971, TCA 77-0972, TCA 77-0973, TCA 77-0974, TCA 77-0975 (N.D. Fla. Jan. 10, 1979), rpt. in Trustees' Br., Mobil IV, App. 9 (App. D, infra, 34a-62a); Coastal Petroleum Co.

to the following.

1. Florida became part of the public lands of the United States as a result of the 1819 treaty with Spain and territorial status followed in 1822. In 1845 Florida was "admitted to the Union on equal footing with the original states, in all respects whatsoever." 5 Stat. 742 (1845).

2. The 1845 Act of Statehood reflects Congress' recognition of the constitutional equal-footing doctrine announced that same year by this Court in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), which case decided that states, on admission, "acquire title to the lands underlying navigable waters within their boundaries." Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363, 370 (1977)

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v. U.S.S. Agri-Chemicals, 695 F.2d 1314 (11th Cir. 1983) (App. E, infra, 63a-84a).

("Corvallis"). Such lands under navigable waters are known in Florida as sovereignty or equal-footing lands and the State has title thereto defeasible only by itself. Corvallis, supra, at 373-74. State law governs how title to sovereignty land passes.[3]

3. Whether title to land originally belonging to the United States has passed to a State is a federal question to be decided by federal law, but once title so passes, state law governs.[4]

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[3] "After a State enters the Union, title to the land [under navigable waters] is governed by state law." Montana v. United States, 450 U.S. 544, 551 (1981), quoted and followed in, e.g., Wisconsin v. Baker, 698 F.2d 1323, 1327 (7th Cir. 1983) (7th Circuit's brackets).

[4] We hold the true principle to be this, that whenever the question in any court, State or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever according

4. Congress passed into law the Swamp and Overflowed Lands Act on September 28, 1850. 9 Stat. 519, codified as amended, 43 U.S.C. §§ 982-84 (the "Swamp Act").[5] The State received from

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> to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839) (emphasis added), quoted in Corvallis at 377.

[5] Its purpose, as stated in the act, was to enable "the several states ... to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein...." 9 Stat. 519, §§ 1, 4, codified as amended, 43 U.S.C. § 982 (1984). All unsold swamp and overflowed lands belonging to the federal government as of September 28, 1850 were granted to the states as of that date. Id.

The act vested with the Secretary of the Interior the duty of making accurate lists and plats of the lands granted by the act. 9 Stat. 519, § 2, codified, 43 U.S.C. § 983. The Secretary

the United States about 20 million acres, or some two-thirds of the State, under the Swamp Act. Pet. App. 4a. This included all land abutting the navigable portion of the Peace River.

5. The Florida legislature responded to the passage of the Swamp Act by passing on January 23, 1851 "an act to secure the swamp and overflowed lands lately granted to the states...." Ch. 332, Laws of Fla. (1851). This act authorized the Governor to classify the lands under the Swamp Act and transmit the plats of these lands to the state register for sale. The legislature expanded on this law in 1855 by creating the Internal Improvement Fund, to which the State's internal improvement lands and

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was then to transmit the lists and plats to the governors of the states involved, and, at the governors' request, to then cause patents to be issued to the states for the lands. Id.

swamp and overflowed lands were transferred that year. The Trustees of that Fund, now known as the Internal Improvement Trust Fund (the "Trustees"), were authorized to fix the price of and sell these lands.[6]

6. Additional grants of authority to the Trustees to dispose of state-owned lands were made from time to time by the Florida legislature. E.g., Pet. App. 6a (Acts of 1919); 1917 Fla. Laws Ch. 7304 (tidal sovereignty lands). The State did not specifically transfer title to its freshwater sovereignty lands to the Trustees until 1969. Fla. Laws Ch. 69-308, codified, as amended

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[6] 1854 Fla. Laws Ch. 610, (enacted January 1855) codified, Fla. Rev. Stat. §§428-429 (1892), amended, 1917 Fla. Laws Ch. 7304, codified as amended, Fla. Stat. § 253.01-.02 (1985). E.g. Pet. App. 35a.

Fla. Stat. § 253.12(1) (1985).[7] At all times prior to that date, title to Florida's freshwater sovereignty lands remained in the State itself and the Trustees had no authority to alienate them. Pet. 5a; App. D, infra, 54a.

7. In 1883 the Trustees, in their name, conveyed a swamp and overflowed lands deed to petitioner's predecessor in interest. The Trustees' deed encompassed the Peace River lands in question, but did not recite any express reservation of rights or title of the State in its sovereignty lands. Pet. App. 42a-51a. Petitioner Mobil Oil Corporation ("Mobil") alleges the deed from the State, which its predecessor in interest received in 1883, gave it title

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[7] See Trustees' Br., Mobil IV, App. 8, A.57-A.61. There was a general transfer of sovereignty lands to the Trustees in 1931. 1931 Fla. Laws Ch. 15642, § 1. (Ex. Sess.), codified as amended, Fla. Stat. § 253.03(1)(b) (1985).

to the river bottom of the Peace River.

8. Incontestably, there is not one sliver of land involved in this litigation which did not pass from the United States to Florida, either by virtue of Florida becoming a state in 1845 or, five years later, under the Swamp Act. This case involves no patent by the United States (or Spain) to a private entity or person either prior to the State acquiring title to the land under the equal-footing doctrine or by virtue of the Act.

9. The 11th Circuit in Mobil I, supra note 2, see App. C, infra, 3a-33a, summarizes the procedural history of this litigation to 1982 and speaks for itself.[8] The 11th Circuit's decision

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[8] Mobil in its petition notes the existence of that decision and the federal court aspect of this litigation (Pet. 9), but asserts that "there is no inconsistency" between its petition and the 11th Circuit's remand order in Mobil I. Pet. 15 n.11. Mobil does not advise this Court as to the issues before the

is indispensable to an understanding of the background of the present case. Mobil so advised the Florida Supreme Court in this case. See Mobil's Ans. Brief at 1 n.2, Mobil IV.

10. Mobil commenced this action (Mobil IV) in April 1982 in Polk County Circuit Court, one month after the 11th Circuit's decision in Mobil I. Mobil received a summary judgment quieting title in its favor. The state court, relying in relevant part on Section 197.228(2), Florida Statutes (1981), held that the State, through the Trustees,

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state court and the federal courts in Mobil I or the fact that Mobil took a position to those courts (and to this Court in its response to Coastal's petition for certiorari) diametrically opposite to that taken in the petition. See Brief of Plaintiff-Appellant Mobil Oil Corporation (at 19-27), Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir. 1982), followed in Brief in Opposition of Respondent Mobil Oil Corp. (at 4-7), Coastal Petroleum Co. v. Mobil Oil Corp., cert. denied, 459 U.S. 970 (1982).

had conveyed the disputed lands to Mobil's predecessor in 1883 by the swamp and overflow lands deed and the Trustees were consequently legally estopped, as a matter of Florida real property law, to rebut a presumption of non-navigability in such circumstances. Pet. App. 50a-51a.

That court expressly declined to decide the question of navigability in fact of the Peace River at Florida statehood in 1845. Pet. App. 48a; accord, Pet. App. 49a (same). For purposes of ruling on summary judgment, the trial court expressly assumed the disputed Peace River lands at statehood "were sovereignty in character" (Pet. App. 48a) and still today "is sovereignty land." Pet. App. 49a.

11. The Florida District Court of Appeal also "assume[d], arguendo, that the lands were sovereignty as opposed to swamp and overflowed lands. . . .,"

Pet. App. 38a. That court affirmed on the trial court's grounds, and held that jurisdiction rested in the Polk Circuit Court, Pet. App. 25a-33a, but certified three questions of Florida law to the Florida Supreme Court for decision:

> I. Do the 1883 swamp and overflowed land deeds issued by the trustees include sovereignty lands below the ordinary high-water mark of navigable rivers?
>
> II. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the trustees' assertion of title to sovereignty lands?
>
> III. Does the Marketable Record Title Act, chapter 712, Florida Statutes, operate to divest the Trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?

Pet. App. 2a; see Pet. App. 40a-41a.[9]

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[9] Mobil acknowledges in its petition that it has rewritten the first of these questions in its petition, purportedly for "clarity." Pet. 11. In fact Mobil rewrote all the questions. A simple comparison of the real questions to those

12. Accepting for purposes of decision that "[w]e are dealing with navigable rivers not 'so-called lakes, ponds, swamps or overflowed lands [the operative words of Section 197.228(2), Florida Statutes (1981)],'" (Pet. App. 6a), the Florida Supreme Court answered each of these questions in the negative, quashed the decision of the District Court of Appeal (except as to the trial court's jurisdiction), and remanded to the lower Florida courts for further proceedings in this case. The issue of the navigability in fact of the Peace River in 1845 is the threshold fact question to be decided at the forthcoming trial on remand.

13. Thus Mobil now asks this Court to decide, and asserts this Court

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set forth in the petition shows that "clarity" was not the purpose of the rewrite. See id.

presently has jurisdiction to decide, whether, on the facts of this case, determinations of the Secretary of Interior as to the character of land under the Swamp Act prior to its transfer to the State are, as a matter of federal law, conclusive against the State and the State's Trustees of its sovereignty lands which passed to the State on Statehood (the "statutory question"). This statutory question was never raised below.[10]

14. Mobil further asks this Court to decide, and asserts this Court

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[10] The statute and statutory question Mobil actually argued to the courts below were the applicability and effect of Section 197.228(2), Florida Statutes (1981). This statute is nowhere mentioned in the petition, although that statute was discussed by all the courts below, and was erroneously relied upon, at Mobil's instance, by the trial court and the district court of appeal as a basis of decision. See, e.g., Pet. App. 6a (Fla. S.Ct.); Pet. App. 37a (Fla. 2d DCA); Pet. App. 47a (trial court); Pet. App. 61a. (motion for rehearing). See also notes 18-20 infra.

presently has jurisdiction to decide, whether, on the facts of this case, a state judicial decision, which holds as a matter of state law that the State's Trustees' swamp and overflowed lands deeds to private parties do not include the State's sovereignty lands below the high water mark of navigable rivers, contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking (the "constitutional question").

Mobil asserts as to the "constitutional question," "[I]t is sufficient that it was unambiguously presented to the State Supreme Court by motion for rehearing...." Pet. 16 (citing Pet. App. 63a-64a), in that "the right, title, or immunity under federal law emerge[d] only because 'the highest state court render[ed] an unexpected interpretation of state law or reverse[d] its prior

interpretation.'" Pet. 16 (citations omitted). Mobil also asserts that "the federal constitutional point was also raised, albeit in a minor way, in a pre-decisional brief in the Florida Supreme Court." Pet. 16.

These comments are contradictory and curious, since Mobil repeatedly raised the takings issue in the Florida Supreme Court in its answer brief on the merits prior to that court's ostensibly unforeseeable decision.[11] But Mobil, in the

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[11] Thus Mobil began its brief in that court with a quotation from a prior decision of the Florida Supreme Court: "If the State has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to the rights specifically reserved in such conveyances." Mobil Ans. Br. at 1, Mobil IV (quoting Odom v. Deltona Corp., 341 So.2d 977, 989 (Fla. 1976) (Boyd, J.)).

See also: "The reason the present Trustees have never sought to reclassify the lands seems obvious; any such official action [to "reclassify

same brief, explicitly and expressly told that court it need not reach the federal question it argued would arise if the Trustees prevailed.[12]

15. In its motion for rehearing in the Florida Supreme Court (Pet. App.

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the lands"], a century after the lands had been deeded into private ownership, would constitute a taking of private property without compensation in violation of the state and federal constitutions." Mobil Ans. Br. at 4, Mobil IV.

[12] Mobil told the Florida Supreme Court, "Although this [Florida Supreme] Court need not reach the federal constitutional question that would arise if the Trustees were correct in their arguments, the point should be stated: for the State of Florida to reclassify lands a century after the conveyance into private ownership would be a clear taking of private property by the State without due process of law in violation of the Fifth Amendment to the United States Constitution if the result is to impair Mobil's title." Mobil Ans. Br. at 22, Mobil IV (citing four decisions of this Court) (emphasis added). Of course, the sole issue to the trial court, to be rendered at the forthcoming trial on remand, is whether Mobil has title to impair. If it does have title, there is no case pending which would impair it.

52a-64a), Mobil noted in a footnote, "Fifth Amendment federal protection under the 'taking' clause, applicable to state action through the Fourteenth Amendment, is also involved in these cases." Pet. App. 53a n.3. As its sixth (and only asserted federal) ground for rehearing, Mobil contended,

> The majority opinion construes Florida law in a manner that effectively takes Mobil's property in violation of the Fifth Amendment to the United States Constitution, as made applicable to the State of Florida by the Fourteenth Amendment. The majority decision allows the executive branch to reclassify lands a century after their conveyance into private ownership.[13]

16. Thus did Mobil seek rehearing of a federal constitutional question

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[13] Pet. App. 63a. Mobil asserted, "As to the first point, the state classified the lands at issue as swamp and overflowed lands under legislatively directed procedures during the 1880s." Pet. App. 62a (emphasis added); but cf. Pet. 4 (which asserts the Secretary of Interior made this classification).

never reached or decided by the Florida Supreme Court or by any other Florida court in this case (before or after remand)--a constitutional question Mobil had counseled the Florida Supreme Court not to reach in deciding the three certified questions of Florida law before it.

This question is nevertheless ostensibly framed by Mobil in this Court "as one[s] in which 'reversal of the state court on the federal issue would be preclusive of any further litigation.'"[14] Mobil does not explain how a court can be reversed on a federal issue it was asked not to, and did not, reach.

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[14] Pet. 18 (emphasis added) (quoting out of context Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-83 (1975), where the state court had reached the new federal issue on rehearing).

REASONS FOR DENYING THE WRIT

In its present posture before this Court, this is a state case to be decided by state law in accordance with this Court's decision in Corvallis, supra. This Court therefore is without jurisdiction to decide it. But even if there were jurisdiction to review the decision below, the petition is without merit for the Florida Supreme Court correctly decided the certified questions of state law before it.

Here, as the 11th Circuit concluded in Mobil I, supra, "[T]here is no question in this case whether, in the sense obviously intended by Corvallis, title to the disputed land has passed [from the United States]; the parties agree that it has. The issue is whether, under Florida law, the [1883] deed to Mobil's predecessor conveyed the dis-

puted property."[15] Florida law is for Florida courts.

I. PETITIONER'S ARGUMENTS ARE WITHOUT MERIT, WHETHER OR NOT THE DECISION BELOW WAS CORRECT.

A. The Statutory Question.

Mobil contends for the first time in this Court that determinations as to the character of land under the Swamp Act by the Secretary of the Inte-

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[15] Mobil I, 671 F.2d at 425 (11th Cir.) (emphasis in original and brackets added), cert. denied, 459 U.S. 970 (1982). App. C, infra, 27a. The 7th Circuit recently reaffirmed this Court's teaching, applicable equally here, that statehood is: "a grant both of property rights and of sovereign power" and "[w]hether the State retains in trust for the public" the title acquired at statehood is, "entirely a matter of [state] law, subject only to the exercise by the United States of one of its constitutional powers." Wisconsin v. Baker, supra, 698 F.2d at 1327 (citing Montana v. United States, supra; Corvallis, supra, United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926); Shiveley v. Bowlby, 152 U.S. 1, 40 (1894); Wilcox, supra, at 517; Mobil I, supra; Heirs of Burat v. Board of Levee Commissioners, 496 F.2d 1336 (5th Cir. 1974)).

rior are conclusive, as a matter of federal law, in a state's subsequent disposition of state-owned property. This contention is not true and was disposed of by this Court in Corvallis. More immediately, this contention was never raised below and this Court thus has no jurisdiction to consider its accuracy.

The effect of determinations by the Secretary of Interior was decided by this Court a century ago in Wright v. Roseberry, 121 U.S. 488 (1887). This Court there held that the federal patents issued pursuant to that Act were "conclusive against any collateral attacks." Wright at 501 (emphasis added). This holding is explained in this Court's decisions in Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935)

and Summa Corp. v. California, 466 U.S. 198 (1984).[16]

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[16] As explained in Summa, two situations are encountered in title battles between a state claiming under the equal footing doctrine, on the one hand, and a person claiming under federal land patents, on the other. See Summa, 466 U.S. at 205-06. In one situation (Borax), the private claimant claims land as a successor in interest to a federal patentee. This Court held the federal government had no power to transfer land already owned by the state as sovereignty land, Borax at 17-19, cited in Corvallis at 376; in a second situation (Summa), the federal government purports to transfer land it has acquired from another sovereign (Mexico) and has not yet passed to a state. This case is similar to the first situation explained in Corvallis. But whereas the defendant private claimant in Corvallis claimed under two federal patents to riparian lands, see, e.g., State ex rel. State Land Board v. Corvallis Sand and Gravel Company, 283 Ore. 147, 582 P.2d 1352, 1356 n.10 (1978) (on remand from this Court), for its avulsion theory, no one here claims title directly under any federal patent. The title battle here is between a State claiming under the equal footing doctrine, on the one hand, and a successor to a private grantee claiming under a State's Trustees' deed, on the other hand. A fortiori, in this situation, state law controls.

Mobil is claiming title to land pursuant to a State's Trustees' 1883 deed, issued in turn, pursuant to an 1855 state statutory grant to the Trustees of swamp land which was part of the land covered by a federal patent issued to Florida (effective 1850), after Florida became a state and had thus already acquired title to riverbottoms under the equal footing doctrine. While, "in the absence of fraud the Secretary's determination of the status of the land, one way or the other, is conclusive and not subject to collateral attack and relitigation in the Courts," Mays v. Kirk, 414 F.2d 131, 135 (5th Cir. 1969) (emphasis added) (citing French v. Fyan, 93 U.S. 169 (1876), and Wright, supra), no substantial federal question appears

in a state's treatment of its subsequent disposition thereof. Mays at 132-35.[17]

That no federal question is here involved has been acknowledged by Mobil for ten years in this litigation (prior to the petition). Thus, relying on Mays, supra, Heirs of Burat, supra, and Charlotte Harbor Phosphate, supra (which also involved a title dispute between phosphate interests and the Trustees over the Peace River), Mobil has heretofore repeatedly taken the position that once it is conceded that title has passed out of the United States, state courts are the proper forum for

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[17] "Accordingly, although the swamps-and-overflowed determination might in the abstract have provided a sufficient jurisdictional base, we find that the Supreme Court's removal of that question from the ambit of judicial review left no unsettled construction of that statute." Mays supra; at 136; see Heirs of Burat, supra; Florida v. Charlotte Harbor Phosphate Co., 74 F. 578 (5th Cir. 1896).

resolution of state land titles under state law.[18] That position is correct and the Florida Supreme Court is the ultimate forum for such resolution.

The two fundamental omissions in the petition's presentation of the putative statutory Question Presented are:

1. In the courts below, Mobil actually argued, "The law of Florida, . . . effectively affirms and incorporates the corresponding federal doctrine that in the administration of the public land

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[18] See Brief of Plaintiff-Appellant Mobil Oil Corp. at 19-27, Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir. 1982), followed in Brief in Opposition of Respondent Mobil Oil Corp. at 4-7, Coastal Petroleum Co. v. Mobil Oil Corp., cert. denied, 459 U.S. 970 (1982). "Were it otherwise, anyone claiming title to real estate in the Western United States could bring suit in federal court since title to all lands in those parts of the nation is traceable to a federal grant or law." Wisconsin v. Baker, supra, at 1327 (citing Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900)).

system factual determinations of the federal land department are final, including factual determination as to the physical character of the lands being 'swamps and overflowed lands.'"[19]

Thus, Mobil below argued that Florida law controls;[20] no federal law or statute was argued by Mobil in the courts below (except as Mobil argued Florida had adopted, as its law, certain federal doctrine).[21] Mobil cannot now

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[19] Mobil Ans. Br. at 12-13, Mobil IV (emphasis added); accord Mobil's Memorandum of Law in Support of its Motion for Summary Judgment, Mobil IV (filed May 17, 1982) (R.57-104). See note 10 supra & App. A, infra, 1a.

[20] Mobil also did so in the 11th Circuit, which concluded Florida law merely looks to federal law "as a criterion by which to decide a state law [title dispute] question." Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 426 (11th Cir. 1982) (App. C, infra, 32a), cert. denied, 459 U.S. 970 (1982).

[21] The petition only points to "citations" (by Mobil in the courts below) of decisions of this Court to support its assertion it somehow raised the statu-

attempt to create in this Court a claim of federal right never set up in the courts below. See 28 U.S.C. § 1257(3); S.Ct.R. 21.1(h).

2. Mobil makes no attempt to explain what is meant by a "collateral attack" in Wright. What appears to be prohibited in Wright is a challenge to the Secretary's determination by third parties. But this case, at least in its present posture, involves neither a direct nor a collateral attack by anyone against the Secretary's determination (whatever that determination is deemed or assumed to be), because all -- most of all Mobil as movant on summary judgment -- must accept, for purposes thereof, that the Peace River was and is navigable.

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tory Question Presented below (Pet. 16), but omits the State statutory law context in which those citations appeared in Mobil's briefs and memoranda in the courts below. See generally note 10, supra.

All agree the navigability in fact of the Peace River at Florida statehood (a federal question under Corvallis and Wilcox, supra) has yet to be determined by the trial court. And the significance of that determination, as the 11th Circuit (and Mobil) said in Mobil I, is solely one of state law:

> The sole significance in this case of the navigability of the Peace River in 1845 is that the State of Florida elects to denominate lands acquired from the United States as sovereignty lands and to restrict the alienability of those lands.[22]

For as this Court reaffirmed in Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669 (1979), "[T]his Court held [in Corvallis] that, absent an overriding federal interest [such as a treaty obligation or interstate compact] the laws

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[22] Mobil I, 671 F.2d at 424 (11th Cir. 1982) (emphasis added) (App. C, infra, 21a.). See also Wisconsin v. Baker, supra, at 1327.

of the several states determine the ownership of the banks and shores of waterways." The only applicable claim of federal right here is the equal-footing origin of the State's title.[23] See generally Wilson at 2539. No federal interest is implicated in the Trustees' title from the State. Neither is any federal interest implicated in Mobil's predecessor's deed from the Trustees. Nor is any federal interest implicated in any questions regarding the Trustees' status and authority vel non as an independent agency of the State. See generally App. E, infra, at 66a n.1.

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[23] The Trustees do not understand, and therefore do not accept, the 11th Circuit's dictum in Mobil I that "neither party asserts navigability as the basis of a right arising under the Constitution or laws of the United States." 671 F.2d at 426. (App. C, infra, 32a). Certainly the Trustees did. 671 F.2d at 422 & n. 6 (App. C, infra, 15a); accord, 695 F.2d at 1316 & n.2 (App. E, infra, 32a). The decision below so recognized. Pet. App. 3a ("uncontroverted legal proposition").

To be sure, Corvallis itself recognized that federal law would continue to apply if "there were present some other principle of federal law requiring state law to be displaced."[24] In this case there is no federal principle requiring such displacement; certainly, the United States has no title claim. And "[t]he Corvallis rule -- that state law governs -- applies where the dispute over the legal effect of a shifting riverbed does not involve claims of title by a federal instrumentality." California ex rel. State Lands Comm'n, supra, 457 U.S. at 289 (Rehnquist, J., joined by

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[24] California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 281 (1982). And Wilson, supra, "made clear that Corvallis also does not apply 'where the [United States] government has never parted with title and its interest in the property continues.'" California ex rel. State Lands Comm'n, 457 U.S. at 282.

Stevens, J., and O'Connor, J., concurring in the judgment).

B. The Constitutional Question.

Mobil's constitutional contention -- that the decision below contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking -- is without merit.

First, Mobil has denied the record to assert that the constitutional issue was not foreseeable until the Florida Supreme Court ruled. This assertion is inherently implausible in light of questions certified to that court for answer; in any case, the record contradicts that explanation. See Statement, supra, at ¶¶14-16. Apparently Mobil makes its "unforseeability" explanation to hide the fact that Mobil asked the Court below not to consider the issue. This request was wise since the issue

was not then (and is not now) ripe for consideration. A "taking" depends on a title to "take" and the existence vel non of title is to be resolved at the forthcoming trial.

Second, as shown below (Argument II, infra), the Florida Supreme Court's decision was neither arbitrary nor unpredictable, and the decisions of this Court cited by Mobil to justify this Court's review of the decision below are inapposite and readily distinguishable.[25]

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[25] Mobil asserts that this Court has, "in a variety of contexts, [reviewed] the decision of a state court . . . to determine whether it has made such an arbitrary or unpredictable declaration of local law as to deny due process or otherwise deprive the petitioner of a federal right." Pet. 24. None of the cases Mobil relies on to support this proposition are on point. Five of the cases cited involved a state court decision, ostensibly based on independent grounds of state law, that arbitrarily deprived an insular group, usually a racial minority, of a federal right. See Ward v. Love County, 253 U.S. 17

Third, none of the procedural hurdles to asserting and arguing a ripe takings claim under the Fifth and Four-

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(1920); Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); NAACP v. Alabama, 377 U.S. 288 (1964); Bouie v. City of Columbia, 378 U.S. 347 (1964). Two of the cases cited involved the express reversal of precedent, neither arbitrary nor unpredictable, in an unsettled area of state law. See Demorest v. City Bank Co., 321 U.S. 21 (1944); Muhlker v. Harlem R.R. Co., 197 U.S. 544 (1905). No Florida court has expressly overruled precedent in the instant case, and Mobil's suggestion that the Florida Supreme Court has implicitly "made new law" by "judicial reinterpretation," Pet. 23, 24, even if true, is not a basis for review in this Court that finds support in any case law.

One case cited by Mobil, Georgia Ry. & Power Co. v. Town of Decatur, 262 U.S. 432 (1923), held that a state commission's decision that a railway transit company was contractually precluded from raising its fares and charging for transfers did not impair an obligation of contract or deny equal protection of the law. The case did not involve a due process or takings claim and the decision in the state court was not "arbitrary or unpredictable." (Georgia Railway was decided in this Court on writ of error; a petition for writ of certiorari was denied. 262 U.S. at 436, 440.)

teenth Amendments has been met. See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, ____ U.S. ____, 105 S.Ct. 3108 (1985) (finality requirements in regulatory takings cases); MacDonald, Sommer and Frates v. Yolo County, ___ U.S. ___, 106 S.Ct. 2561 (1986) (same).[26] As noted, the factual predicate for a determination of Mobil's title remains for the forthcoming trial.

Fourth, assuming the constitutional question was properly presented and preserved in the courts below (contra, Statement, supra), it remains on remand. The decision below did not decide the threshold question (in any alleged takings dispute) of title. The decision below only recognizes the right of the Trustees

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[26] Williamson was the basis for this Court vacating and remanding Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), relied upon by Mobil. See ____U.S.____, 105 S.Ct. at 3269.

to establish title to those disputed lands as sovereignty lands if they can. None of the courts below has reached the question of navigability in fact. Nor have several of Mobil's defenses to the Trustee's claim of title been reached. In the event the Trustees prevail on all those issues at trial, Mobil will have ample opportunity to seek appellate review thereof.[27]

Implicitly recognizing that "title" remains for trial, Mobil also argues that the decision below affects its "security of title. . . that has already been taken without compensation."

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[27] The Trustees do not maintain that a ripe takings question could never arise if the Trustees were to prevail on all title issues in the Florida courts; only that any such question may never arise or, alternatively, may become moot before it is ever reached. Contrary to Mobil's suggestion, no issue of judicial or executive branch reclassification of land is presented or intimated in the decision below.

Pet. 17 This assertion is unsupported by any authority in Mobil's petition. Further, this assertion is nothing more than a contention that any time a court fails to grant a summary judgment against a sovereign regarding real property, the property is "taken" because the requirement to go to trial impairs "security of title" (which, presumably, imposes on the court denying the summary judgment an obligation to pay compensation). It is hardly surprising Mobil can locate no authority for such a contention.

If, despite the foregoing, Mobil believes the decision below contravenes the Due Process Clause of the Fourteenth Amendment, the Trustees submit Mobil should present such arguments in the courts below. This Court should decline Mobil's invitation to decide them, in the first instance.

II. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE THREE CERTIFIED QUESTIONS OF STATE LAW BEFORE IT.

The First Certified Question.

In answer to the first certified question, the court below, relying on longstanding Florida precedents, concluded the 1883 Trustees' swamp and overflowed lands deed to Mobil's predecessor in interest does not include sovereignty lands below the ordinary high-water mark of navigable rivers. As stated in the decision below:

> We [the Florida Supreme Court] answered the first certified question in the negative when we held in Martin [v. Busch, 93 Fla. 535, 573, 112 So. 274, 286-87 (1927)] that: ... "The subsequent vesting of title to sovereignty lands in the Trustees for State purposes under the Acts of 1919 or other statutes does not make the title to sovereignty land inure to claimants under a previous conveyance of swamp and overflowed lands by the State Trustees who then had no authority to convey such sovereignty lands and did not attempt or

intend to convey sovereignty lands."[28]

The decision below followed the axiomatic principle of Martin, supra, and Pierce, supra, that as a matter of Florida law those who took swamp and overflowed lands deeds from the Trustees granted prior to the vesting of title of sovereignty lands in the Trustees took with notice that the "grant did not and could not include any sovereignty

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[28] Pet. App. 5a-6a (emphasis added). Accord Pierce v. Warren, 47 So.2d 857, 858-59 (Fla. 1950), cert. denied, 341 U.S. 914 (1951) ("If the Trustees of the Internal Improvement Fund actually conveyed 'sovereignty lands,' believing them to be 'swamp and overflowed lands,' their mistake, however, innocent, would not supply the power they lacked."); see Pierce at 858 ("[T]he basic question for us to determine is whether the trustees attempted to convey 'sovereignty lands' which they could not have done before the enactment of Chapter 7304, Laws of Florida, Act of 1917 [now Fla. Stat. § 253.12(1) (1985)], or did deed 'swamp and overflowed lands,' which they were empowered to do.").

land."[29] This has been hornbook lawin Florida for decades. [30]

The question whether the State qua the State, which held title to fresh-

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[29] Pierce, supra, at 860. The decision below thus made the same doctrinal distinction on state law grounds recognized by Florida courts throughout the Trustees' history: "The title to sovereignty lands at this point [i.e., in the 1850's and at the time of the 1883 deeds] remained in the legislature as a public trust." Pet. App. 5a. See State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893); State ex rel. Ellis v. Gerbing, 56 Fla. 603, 608, 47 So. 353, 355 (1908); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).

[30] See, e.g., 42 Fla.Jur.2d Public Lands § 60 ("Invalid Sales by Trustees") (1983). In 1967 the Florida Legislature codified the distinction taken in Martin and Pierce with respect to conveyances by the Trustees after vesting of title in the Trustees: "All conveyances of sovereignty lands or fill material heretofore made by the Board of Trustees of the Internal Improvement Trust Fund of Florida subsequent to the enactment of Chapter 6451, Act of 1913, Chapter 7304, Act of 1917, and Chapter 57-362, as amended, are hereby ratified, confirmed, and validated in all respects." 1967 Fla. Laws Ch. 67-393, § 1(2), now codified, Fla. Stat. § 253.12(8) (1985) (emphasis added).

water sovereignty lands in itself prior to 1969, could ever convey freshwater sovereignty lands held in trust to private parties is not presented. See Fla. Const. art. X, § 11 ("Sovereignty Lands"). The first certified question asked only whether the Trustees could do so in 1883. The negative answer in the decision below was wholly foreseeable.[31]

The decision below, in analyzing the first certified question, observed, "It is important to recognize that Con-

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[31] All the foregoing Florida cases recognize the special character of sovereignty lands under Florida law. All of them trace their intellectual origins to Black River Phosphate, supra, and Gerbing, supra, which, in turn, followed this Court's equal footing principles and the public trust doctrine with respect to the state's title to lands under navigable waters. See Black River Phosphate, supra, 13 So. at 644 (citing Pollard's Lessee, supra; Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); and Martin, supra,); accord Gerbing, supra, 47 So. at 355-56 (quoting 1845 Act of Statehood and citing Illinois Cent. R. R. Co. v. Illinois, 146 U.S. 387 (1892)).

gress had *no intent or power* to convey state sovereignty lands through such [swamp and overflow lands] acts or patents and that land surveys conducted in connection with these conveyances of swamp and overflowed lands are not conclusive against the state as to the meander boundaries of state sovereignty lands." Pet. App. 4a.[32]

A fortiori, the Trustees could not convey to private parties sovereignty lands over which the Trustees had no title or authority under Florida law

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[32] For this proposition the decision below relied on Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 16 (1935), reh'g denied, 296 U.S. 664 (1936), and prior decisions of this Court cited therein, as well as Martin, supra. This proposition is further supported by the explicit language of United States v. O'Donnell, 303 U.S. 501, 509 (1938), "The Swamp Lands Act of 1850 was effective to transfer an interest in the lands described in the Act, only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress." (Emphasis added). See note 40, infra.

(prior to 1969). The Florida Supreme Court had explicitly so held at least as early as 1908. Gerbing, supra, 56 Fla. at 612, 47 So. at 356.[33]

The Second Certified Question. The decision below, in response to the second certified question, held that the doctrine of legal estoppel or estoppel by deed does not apply to the 1883 swamp and overflowed lands deed, and consequently does not bar the Trustees' assertion

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[33] In 1979 the United States District Court for the Northern District of Florida, in International Minerals, supra, a diversity jurisdiction case, reached the same conclusions as to the Trustees' lack of title and authority prior to 1969. See text infra ___ App. D, infra.

The Fifth Circuit had held, at least as early as 1896, that title disputes between private claimants and the Trustees over the Peace River belonged in State court and must be decided by State law. Florida v. Charlotte Harbor Phosphate Co., supra.

of title to sovereignty lands in the lower Florida courts.[34]

Mobil asserts that the "fundamental doctrine of legal estoppel" ought to apply here. Pet. 22. Mobil mistakenly asserts, "[T]here is no doubt these principles were [previously] deemed fully

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[34] In so holding, the Court below observed, "This question was also addressed and answered in Martin, as the quotations above show." Pet. App. 7a:

> Not only is there no legal estoppel to the Trustees' claim of ownership in sovereignty lands, but the Trustees are prohibited by case law from surrendering state title to sovereignty lands based on a prior conveyance of swamp and overflowed lands. . . . The fact that a deed of swamp and overflowed lands does not explicitly exempt sovereignty lands from the conveyance does not show that the Trustees intended to convey sovereignty lands encompassed within the swamp and overflowed lands being conveyed. . . . Martin, 93 Fla. at 569-73, 112 So. at 285-87.

Pet. App. 7a; accord, App. D, infra, 54a-55a.

applicable by the Florida Supreme Court against a claim that the conveyance erroneously included 'sovereignty lands.'" Pet. 22 (brackets added and citations omitted). The Florida estoppel cases relied upon by Mobil in the petition are all distinguishable on their facts, as demonstrated in Coastal Petroleum Co. v. International Minerals & Chemical Corp., supra.[35]

In 1927 the Florida Supreme Court held in Martin that a swamplands grantee takes with double notice, "The grantee takes with notice that the convey-

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[35] Rpt. in Trustees' Br., Mobil IV, App. 9 (App. D, infra, 34a-63a). Mobil's Florida counsel here represented defendants in that case. Mobil's counsel of record in this Court represented these defendants in a subsequent consolidated appeal of a later injunction in that case. See generally Coastal Petroleum Co. v. U.S.S. Agri-Chemicals, 695 F.2d 1314, 1315, 1319 (11th Cir. 1983) (App. E, infra, 63a-84a) (holding, inter alia, that International Minerals, supra, constituted a non-appealable interlocutory order).

ance of swamp and overflowed land does not in law cover any sovereignty lands, and that the trustees of the swamp and overflowed lands as such have no authority to convey sovereignty lands." 93 Fla. at 570, 112 So. at 285-86 (emphasis added).

The Secretary of the Interior himself has never claimed, and would not claim, power to convey by patent to a State sovereignty lands always owned, by definition, by that state. This Court has always so held.[36] In holding that

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[36] "[B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of the government, United States v. Oregon, [295 U.S. 1, 13 (1935)], it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.'" Montana v. United States, 450 U.S. 544, 552 (1981) (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926)).

Indeed, "The State is probably correct in stating that Congress could not, without making provision for payment or compensation, pass a law depriving a

the Trustees are not estopped to assert and attempt to prove that the disputed Peace River lands are in fact sovereignty lands, the decision below does no more than reflect the same concern for the sovereign rights of the State's people and the same rules of deed construction that have been long recognized by this Court.[37]

State of land vested in it by the Constitution." Block v. North Dakota ex rel. Board of University & School Lands, 461 U.S. 273, 291 (1983).

[37] See, e.g., United States v. Oregon, supra, at 14 (strong presumption against alienation of sovereignty lands); Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410-11 (1842) (principle that people of each state in their sovereign character own all their navigable waters dates to the Revolution itself, "subject only to their rights since surrendered by the Constitution to the general government"). See also The Charles River Bridge Case, 36 U.S. (11 Pet.) 420 (1837) (state charter grants must be construed narrowly; no implied rights of private grantees assumed; ambiguities must be construed in favor of state).

In the procedural posture here, as in the Northern District of Florida in 1979 in International Minerals, supra, at 9-10:

> Unlike Odom, it has not yet been determined whether the lands in dispute are non-sovereign and therefore indisputably capable of conveyance to private parties. If sovereign, it is evident that the Trustees were wholly without authority to alienate them until 1969, a date subsequent to the conveyances to defendants' predecessors in interest. The state may not be estopped by the unauthorized acts of its officers.
>
> There is another, perhaps even more compelling reason why the Trustees' deeds cannot work an estoppel against the State of Florida. The deeds contain no indication that the state intended to convey title to sovereign lands. . . . It is clear, however, that under the public trust doctrine the intent to alienate trust property must be clearly stated. Martin v. Busch, supra. . . . Estoppel by deed is therefore inapplicable.

(App. D, infra, 54a-55a) (some case citations omitted).

The Third Certified Question.

"The final certified question is whether the Marketable Record Title Act (MRTA), Chapter 712, Florida Statutes, operates to divest the state of title to sovereignty lands." Pet. App. 7a-8a. The court below answered this question in the negative, "conclud[ing] that the legislature did not intend to make MRTA applicable to sovereignty lands." Pet. App. 9a.[38]

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[38] The court below noted language to the contrary in that court's prior decision in Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976), which had been relied upon by Mobil and the lower Florida courts in this case. The decision below analyzed Odom, determined "[t]his reliance [on Odom] is misplaced," Pet. App. 8a, concluding that Odom was entirely distinguishable on its facts (based on Odom's "factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands"). Id. The decision below explained, "The statements [in Odom] concerning the effect of MRTA on navigable waterbeds were dicta and are non-binding in the instant case inasmuch as there were no navigable waterbeds at issue in Odom." Id. That court also observed that its post-Odom decision

After examining (in response to the first two certified questions) "the well established law that prior conveyances did not convey sovereignty lands encompassed within swamp and overflowed lands being conveyed," Pet. App. 9a, the decision below "assume[d] that the legislature knew this well-established law when it enacted MRTA." Id.

Mobil disputes the assumption of the court below, but the decision below affords ample support for its interpretation of MRTA in light of the constitutional codification of the public trust doctrine in the Florida Constitution:

> We are persuaded that had the legislature intended to revoke the public trust doctrine by

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in Askew v. Sonson, 409 So.2d 7 (Fla. 1981), rendered prior to the filing of this action, expressly "declined to rule 'on the question whether the title to what had been sovereignty lands could be perfected by MRTA prior to the effective date of the 1978 amendment.' Id. [Askew] at 9." Pet. App. 8a.

> making MRTA applicable to sovereignty lands, it would have, by special reference to sovereignty lands, given some indication that it recognized the epochal nature of such restoration. We see nothing, in the act itself or the legislative history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets. The legislative purpose of simplifying and facilitating land title transactions does not require that the title to navigable waters be vested in private interests.

Pet. App. 9a.

Mobil and amicus Florida Land Title Association, Inc. ("FLTA") argue, in effect, that the court below overruled its 1976 decision in Odom, supra. This is not correct as the decision below explained, noting the specific reservation of the issue in its 1981 decision in Askew v. Sonson, supra. Pet. App. 8a. But even if one concluded the decision below did overrule Odom, decided ten years

earlier, no rights of Mobil (or FLTA) are denied or impaired.[39]

CONCLUSION

The Florida Supreme Court thus correctly decided the three certified questions of state law before it.[40]

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[39] A trial on the issue of navigability vel non is hardly more difficult in 1987 than it was in the late 1970s when Mobil and other phosphate interests litigated the same issues with the same parties over the same Peace River in sundry state and federal courts.

Moreover Mobil did not act in reliance on Odom. See also App. D, infra, 34a-62a. See generally, App. E., infra 82a. Mobil purchased the subject land before Odom was decided and commenced this action after the Florida Supreme Court in Askew v. Sonson, supra, specially declined to rule whether Odom applied in light of its factual context (small ponds and lakes) and the statute (Section 198.228(2), Florida Statutes (1975)) which applied to that factual context.

[40] This Court has long held "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." E.g., United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17

Neither that court nor the lower Florida courts considered the putative federal Questions Presented in the petition. Nor should this Court consider them. The ostensible statutory Question Presented is nothing more than a failed attempt to recast Mobil's tautological argument under Section 197.228(2), Florida Statutes (1981). Independently, the petition, in its framing of the supposed constitutional Question Presented, denies the record, ignores both Florida precedent

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(1977) (citing prior decisions of the Court), reh'g denied, 431 U.S. 975 (1977). Mobil's predecessor had record and constructive notice of this Court's decision in Barney v. Keokuk, 94 U.S. (4 Otto 324) (1877), which held that the state's title included the beds of all waters, which upon admission to the union, were actually navigable, whether or not they were affected by the tide. Therefore Mobil's predecessor knew or should have known in 1883 that no federal patent could have conveyed sovereignty lands to the State. See State ex rel. State Land Board v. Corvallis Sand and Gravel Co., 283 Or. 147, 582 P.2d 1352, 1356 (1978) (on remand from this Court).

and the nature of this action, and suffers from an erroneous major premise. Mobil can claim no uncompensated taking has occurred, in that, (i) Mobil has not yet been, and indeed may never be, divested of title to the Peace River Property on trial, and (ii) Mobil has not "sought compensation [for a taking] through the procedures the State has provided for doing so. . . ." MacDonald at 3121.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Fund of the State of
Florida

Dated: January 6, 1987

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Appendix A

Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.

Fla. Stat. § 197.228(2, (1981), renumbered, Fla. Stat. § 253.141(2) (1985).

Appendix B

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .
. . .

3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 1257(3) (emphasis added).

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 81-5533, 81-5812

MOBIL OIL CORPORATION, a New York Corporation,

Plaintiff-Appellant,

v.

COASTAL PETROLEUM COMPANY, a Florida Corporation,

Defendant-Appellee.

MOBIL OIL CORPORATION, a New York Corporation,

Plaintiff-Appellant,

v.

COASTAL PETROLEUM COMPANY, A Florida Corporation, and The State of Florida Department of Natural Resources and The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Florida

March 4, 1982

Before MORGAN, TJOFLAT and JOHNSON, Circuit Judges.

TJOFLAT, Circuit Judge:

I.

These consolidated appeals arise out of a lawsuit whose complex procedural history we need only summarize. On September 24, 1976, Mobil Oil Corporation (Mobil) filed a complaint in the Circuit Court for Leon County, Florida, seeking a declaration of its rights under an oil exploration agreement with Coastal Petroleum Company (Coastal). Coastal responded with five counterclaims, the second of which alleged Mobil's conversion of phosphate from lands owned by the State of Florida and leased by Coastal. Coastal joined as a necessary party to the second counterclaim the Trustees of the Internal Improvement

Trust Fund of the State of Florida (the Trustees), who hold title to state lands.

On November 20, 1979, Mobil filed a counterclaim (the reply counterclaim) against Coastal and the Trustees, seeking a declaration of the parties' rights based on an 1862 deed from the Trustees to Mobil's predecessor in interest encompassing eighty acres of unmined land coursed by the Peace River. On December 20, 1979, the Trustees and Coastal (appellees) removed the case to the district court, asserting that Mobil's reply counterclaim raised a substantial federal question by challenging the Trustees' sovereignty claim to the subject land. Mobil moved to remand the case to the state court, but the district court denied the motion.

In December of 1980, Coastal's fourth counterclaim was tried in the district court, resulting in a final

judgment on a jury verdict in favor of Coastal. In No. 81-5533, Mobil appeals that judgment, contending that the district court lacked subject matter jurisdiction of the reply counterclaim, and therefore of the case, and that the district court committed error in the conduct of the trial.[1]

On July 29, 1981, Coastal moved the district court for an injunction to prohibit Mobil from proceeding further in a related state court quiet title action. The district court entered an

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[1] In addition to its jurisdictional contention, Mobil argues that the record contains no evidence to support the jury's assessment of compensatory damages and that the district court erred in ruling that the Mobil-Coastal oil exploration agreement required Mobil to furnish a geochemical report to Coastal; in instructing the jury that it could award more than nominal damages under Count One of Coastal's fourth counterclaim; in submitting a misrepresentation claim to the jury; and in submitting Coastal's request for punitive damages to the jury.

order enjoining the parties from filing or further litigating in any state or federal court any lawsuit which would require the determination of any legal or factual issue forming the basis of this lawsuit or necessarily relating thereto. In No. 81-5812, Mobil appeals the injunction, contending that it is prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), and, again, challenging the subject matter jurisdiction of the district court. Because we conclude that the district court lacks jurisdiction of this case, we reach none of the other issues raised in these consolidated appeals.

II.

The federal removal statute, 28 U.S.C. § 1441 (1976), permits defendants to remove state court civil actions of which the federal courts have

original jurisdiction.[2] The jurisdictional question presented in this case is whether Mobil's reply counterclaim arises under federal law within the meaning of 28 U.S.C.A. § 1331(a)(West Supp.

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[2] 28 U.S.C. § 1441 (1976) provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

1980)[3] so as to be removable.[4] The reply counterclaim alleges in relevant part:

ALLEGATIONS COMMON TO ALL COUNTS

1. This is an action for declaratory judgment pursuant to Chapter 86, Florida Statutes. The subject matter of the controversy exceeds $2,500 in value.

2. MOBIL owns, and is in possession of the SE 1/4 of NW 1/4 and

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[3] 28 U.S.C.A. § 1331(a) (West Supp. 1980) provides: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[4] No other claim in the case is asserted to arise under federal law. The Trustees correctly concede that the action could not be removed on diversity grounds because, assuming arguendo that the Trustees are a citizen for purposes of diversity, removal on diversity grounds is permitted only if no defendant is a resident of the state where the action was brought. See 28 U.S.C. § 1441(b), supra, note 2. Coastal's argument that Mobil waived the right to challenge removal on diversity grounds is meritless.

SW 1/4 of NE 1/4 of Section 23, Township 31 South, Range 25 East, Polk County, Florida. The Peace River courses a part of these lands and parts lie within the swamps that adjoin the river.

3. MOBIL's ownership is based on a continuous chain of title which began with a deed from the State of Florida to Henry S. Seward dated November 20, 1862. The deed ... does not mention any rivers, waterbodies or watercourses nor does it reserve any interest in STATE.

4. STATE and COASTAL have asserted in this suit that MOBIL has converted phosphate by having mined certain lands allegedly owned by STATE and that are subject to a mineral lease between STATE and COASTAL. . . . The lands described in paragraph 2, above, have not been mined and, accordingly, are not among the lands from which phosphate has allegedly been converted.

5. The conversion claims of STATE and COASTAL are bottomed on the contention that the lands from which the phosphate was allegedly taken underlie waterbodies or watercourses which were navigable in fact when Florida became a State on March 3, 1845, and, as such, ar sovereignty lands.

* * * * * *

COUNT I

(Lands are not sovereignty in character)

10. The Peace River was not "meandered" (which would have indicated navigability) nor otherwise designated as navigable, by the original government surveyors or those who prepared the original township plats at any point north of the dividing line between Townships 38 and 39.

11. The Peace River was not navigable in fact on March 3, 1845, at any point north of the dividing line between Townships 38 and 39. Township 31 is north of that line.

12. Inasmuch as there were no navigable waterbodies on the lands described in paragraph 2, above, on March 3, 1845, no part of the lands are sovereignty lands.

The eight remaining counts of the reply counterclaim involve, all parties agree, only state law questions.

For a case to arise under federal law, a right or immunity created by that law must be an essential element of the plaintiff's claim; the federal right or immunity that forms the basis of the claim must be such that the claim will be supported if the federal law is given one construction or effect and defeated if it is given another. Maxwell

v. First Nat'l Bank of Monroeville, 638 F.2d 32, 35 (5th Cir. 1981);[5] In Re Carter, 618 F.2d 1093, 1100 (5th Cir. 1980), citing Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936). In order to determine whether the claim arises under the Constitution or laws of the United States, we look to the complaint unaided by anticipated defenses and with due regard to the real nature of the claim. Maxwell, 638 F.2d at 35; Gully, 299 U.S. at 113, 57 S.Ct. at 98. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit

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[5] The Eleventh Circuit has adopted as binding precedent decisions rendered by the former Court of Appeals for the Fifth Circuit before the close of business on September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States." Heirs of Burat v. Bd. of Levee Comm'rs, 496 F.2d 1336, 1342 (5th Cir.), cert. denied, 419 U.S. 1049, 95 S.Ct. 625, 42 L.Ed.2d 644 (1974), quoting Shulthis v. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205 (1912).

Acknowledging these precepts, the parties differently characterize Mobil's pleading. Pointing to the reply counterclaim's challenge to Florida's acquisition of title to the disputed lands as sovereignty lands, the Trustees and Coastal argue that Mobil's claim turns on a federal question, namely,

the navigability of the Peace River on March 3, 1845, the date Florida was admitted to the Union. If the Peace River was navigable at that date, title to the lands beneath the river passed from the United States to the State of Florida under the equal footing doctrine[6] and were received by Florida as sovereign lands. The passing of title under the equal footing doctrine, the argument continues, is a federally created right which is governed by federal law; thus, the navigability of the Peace River on March 3, 1845, is a substantial federal

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[6] Under the equal footing doctrine, "the new States . . . have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." Mumford v. Wardwell, 6 Wall. 423, 436, 18 L.Ed. 756 (1867). Pollard's Lessee v. Hagan, 3 How. 212, 11 L.Ed. 565 (1845), held that under the equal footing doctrine, new states, upon their admission to the Union, acquire title to the lands underlying navigable waters within their boundaries.

question supporting federal subject matter jurisdiction.

Mobil maintains that its reply counterclaim involves a mere title dispute between Florida land claimants, each of whom derives its claim from the State, so that Florida law, and not federal law, governs the controversy. While federal law may determine the navigability of waters for the limited purpose of ascertaining whether title to a riverbed passed from the United States to Florida when Florida became a state, once title has passed, as the parties agree has occurred here, Florida law governs any subsequent claim to the property.

In its denial of Mobil's motion to remand, the district court embraced the characterization advanced by the Trustees and Coastal:

> The navigability of the waterbodies in issue in 1845 and the location of the ordinary

high water line of the water-bodies in 1845, if they were navigable, are issues to be determined by federal law. Additionally, in this case the determination of these federal questions is a condition precedent to a declaration of Mobil's rights of ownership with respect to the lands which it claims through various deeds and patents. Mobil correctly states that a determination of whether the property in question was transferred into private ownership is a state question, which must be determined in accordance with State law, necessarily involving the State test of navigability. However, Mobil ignores the essential and initial necessity for a determination of the federal questions raised by its declaratory action before the State questions may even be reached. . . .

Mobil's "counterclaim" can thus be seen to have brought this action within the original jurisdiction of this Court as an action "arising under" federal law. Mobil's declaratory claim seeks fundamentally to resolve whether the sovereignty claim of the Trustees and Coastal, upon which the conversion claim is based, is valid. A determination of the validity of the sovereignty claim depends on the navigability of the

> rivers in issue at statehood, a federal question.

(citations omitted).

Clearly enough, Mobil does not allege that the Peace River was not navigable in fact on March 3, 1845, and that the disputed property is therefore not sovereignty land. The appellees cite United States v. Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935), and United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931), for the proposition that the question whether a river is navigable so that the submerged lands pass to a state at statehood is a federal question supporting federal jurisdiction. Those cases were property contests between the United States and a state. We do not question that when the United States and a state dispute whether submerged land has passed to a state under the equal footing doctrine

or remains federal land, navigability is a federal question. In order to ascertain whether Mobil's claim, with due regard to its real nature, presents a substantial controversy respecting the validity, construction, or effect of federal law, however, we must identify the role which the asserted federal question plays in the present controversy.

The disputed property was deeded by the State of Florida to Mobil's predecessor in interest in 1862, and the state held title to the property at the time of the conveyance. Title had passed to the state by one of two means: either Florida acquired the lands under the equal footing doctrine at statehood on March 3, 1845, because the Peace River was then navigable, or Florida acquired the lands in 1850 under the Swamp and Overflow Lands Grant Act, 9 Stat. 520, now codified at 43 U.S.C.§ 982 (1976). If the state

acquired the lands under the equal footing doctrine in 1845, they were received as sovereignty lands; otherwise, they were not. Florida law treats sovereignty lands differently than other lands: sovereignty lands, unlike other lands, are held by the state in public trust and are subject to certain restrictions on alienation.

The position of the Trustees and Coastal is that the Peace River was navigable on March 3, 1845, so that the state received the disputed lands as sovereignty lands and the 1862 deed did not, under Florida law, convey the property to Mobil's predecessor in interest. Mobil's position is that the Peace River was not navigable on March 3, 1845, so that the state received the disputed lands in 1850 as nonsovereignty lands, and the 1862 deed, under Florida law,

conveyed the property to Mobil's predecessor in interest.

The sole significance in this case of the navigability of the Peace River in 1845 is that the State of Florida elects to denominate lands acquired from the United States under the equal footing doctrine as sovereign lands and to restrict the alienability of those lands. The federal question relied on by the appellees is a mere criterion which Florida chooses to adopt as the determinant of a rule of state real property law. In 1862, before the state deeded the disputed property to Mobil's predecessor in interest, the state was at absolute liberty, so far as federal law was concerned, to treat the property as it wished. If the property was subject to restrictions on alienation, those restrictions were imposed by state law. That the state chose to look to the equal

footing origin of the lands as fixing forever their sovereign character is no predicate for federal jurisdiction.

Properly viewed, then, the question which is asserted to support the jurisdiction of the district court is incidental to Mobil's claim and not at its essence; nor does the fact that a determination of navigability may resolve the controversy alter our conclusion.

> The whole foundation of the duty is [state] law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so . . . the cause of action arises wholly from the law of the State. . . . The mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the State law to be also a case under the law of the United States. . . .

Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214-15, 41 S.Ct. 243, 250, 65 L.Ed. 577 (1921) (Holmes, J., dissenting).

The decision of the Supreme Court in Oregon ex rel State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), strongly supports our holding. There, the State of Oregon had brought a state court ejectment action against an Oregon corporation over the ownership of two portions of land underlying the navigable Willamette River. One portion had been within the riverbed since Oregon's admission to the Union, while the other had only later become part of the riverbed because of changes in the river's course. The Oregon courts took the view that federal common law controlled the dispute because the extent of a state's sovereign right under the equal footing doctrine

was a federal question. On this basis, they awarded the first portion to the state and the second to the corporation.

On certiorari, the Supreme Court vacated the judgment and remanded, holding that ownership of the disputed lands should be decided solely as a matter of Oregon law and not federal common law, because application of federal common law was required neither by the equal footing doctrine nor by any other principle of federal law. So holding, the Court overruled Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), and repudiated Bonelli's holding that the nature of the title conferred by the equal footing doctrine is governed by federal common law. 429 U.S. at 369-70, 97 S.Ct. at 586-587. "Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of

a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." Id. at 370-371, 97 S.Ct. at 587. Most significantly here, the Court reaffirmed that:

> [W]henever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but . . . whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

Id. at 377, 97 S.Ct. at 590, quoting Wilcox v. Jackson, 13 Pet. 498, 517, 10 L.Ed. 264 (1839) (emphasis in original).

The Trustees and Coastal would limit Corvallis to title disputes in which the parties agree that the lands previously acquired by the state were acquired as sovereignty lands. The Supreme Court in Corvallis foreclosed this interpretation of its decision. The Court held that state law governs the disposition of property held by a state regardless of whether or not the state acquired the property as sovereignty land under the equal footing doctrine:

> Thus, if the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions.
>
> * * * * * *
>
> A similar result obtains in the case of riparian lands which did not pass under the equal footing doctrine. This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

429 U.S. at 378, 97 S.Ct. at 591.

The appellees insist that the pivotal issue in this case is indeed, as Corvallis requires, "whether a title to land which had once been the property of the United States has passed," because the principal controversy is whether the Trustees acquired title to the disputed lands in 1845 under the equal footing doctrine, or in 1850 as swamp and overflow lands. But there is no question in this case whether, in the sense obviously intended by Corvallis, title to the disputed land has passed; the parties agree that it has. The issue is whether, under Florida law, the 1862 deed to Mobil's predecessor conveyed the disputed property. That Florida chooses to answer this question by inquiring by what means it initially acquired title to the property does not alter the fact that this

is a case in which, title having passed to the state, state law controls.

A case bearing more directly on the collateral relationship between the navigability of the Peace River in 1845 and the present controversy is Miller's Executors v. Swann, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893). In Swann, Congress had granted public lands to the State of Alabama to aid in the construction of railroads. The Act granting the land provided explicit conditions governing any further conveyance by the State. The State conveyed the land to a railroad company, retaining a mortgage whose terms paralleled the conditions imposed by Congress. Upon the bankruptcy of the railroad, the State and a vendee of the railroad both claimed a certain parcel of land, disputing whether the railroad had sufficiently complied with the conditions of the Act of Congress

(as incorporated in the mortgage) to give it the power to convey to the third party claimant. The Alabama Supreme Court determined that the conditions had not been met, and that the State was entitled to the land. On appeal to the United States Supreme Court, the Court concluded that it was without jurisdiction to hear the matter for want of a federal question:

> Now, whether [the Supreme Court of Alabama's] was a correct construction or not of the act [conveying the land to the railroad] and the reservation of the mortgage, is a purely local question, and involves nothing of a federal character. The question is not what rights passed to the state under the acts of congress, but what authority the railroad company had under the statute of the state. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of congress as prescribing the rule and measure of the rights granted by the state does not make

> the determination of such rights a federal question. A state may prescribe the procedure in the federal courts as the rule of practice in its own tribunals: it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of congress, the rules of the federal courts, and the practices of the land department, and yet the questions for decision would not be of a federal character. The inquiry along federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a federal origin.

Id. at 136-37, 14 S.Ct. at 54 (emphasis added).

We find nothing in the case law since Swann that causes us to question its currency, see, e.g., Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 54 S.Ct. 402, 78 L.Ed. 755 (1934); Morris v. Danna, 411 F.Supp. 1300 (D. Minn.

1976), aff'd, 547 F.2d 436 (8th Cir. 1977), or its obvious applicability to this case.

Our conclusion that the district court has no jurisdiction of this case comports with the fact that there is no federal interest whatever in the resolution of this controversy. Federal law is appropriately indifferent to Florida's invocation or application of a federal test of navigability as a precondition to determining a question of state law. The appellees direct us to United States v. Holt State Bank, 270 U.S. 49, 55-56, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), in which the Court held that "Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. . . .

To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended." Here, not as in Holt State Bank, neither party asserts navigability as the basis of a right arising under the Constitution or laws of the United States. Moreover, no uniform interpretation of federal law is intended or needed when the federal law exerts no force proprio vigore but is merely set up by the state as a criterion by which to decide a state law question.

III.

We hold, then, that the district court lacks jurisdiction of this case. The judgment appealed in No. 81-5533 is vacated, and on receipt of the mandate the district court shall remand the case

to the state court. The injunction appealled in No. 81-5812 is dissolved.*

VACATED, with instructions.

6867-98.6

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* We note that on October 15, 1981, the district court extended the injunction in this case to apply to American Cyanamid Company which is involved in a similar lawsuit against Coastal. American Cyanamid Company's appeal of that injunction is now pending before this court in Case No. 81-6061.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COASTAL PETROLEUM COMPANY, et al.,	)	
Plaintiffs,	)	
vs.	)	TCA 77-0946
INTERNATIONAL MINERALS & CHEMICAL CORPORATION,	)	
Defendant.	)	

COASTAL PETROLEUM COMPANY, et al.,	)	
Plaintiffs,	)	
vs.	)	TCA 77-0971
U.S.S. AGRI-CHEMICALS,	)	
Defendant.	)	

COASTAL PETROLEUM COMPANY, et al.,	)	
Plaintiffs,	)	
vs.	)	TCA 77-0972
SWIFT AGRICULTURAL CHEMICALS CORPORATION,	)	
Defendant.	)	

COASTAL PETROLEUM COMPANY, et al.,	)	
Plaintiffs,	)	
vs.	)	TCA 77-0973
AGRICO CHEMICAL COMPANY,	)	
Defendant.	)	

COASTAL PETROLEUM COMPANY, et al.,	)	
Plaintiffs,	)	
vs.	)	TCA 77-0974
W. R. GRACE & COMPANY,	)	
Defendant.	)	

COASTAL PETROLEUM COMPANY, et al.,	)	
Plaintiffs,	)	
vs.	)	TCA 77-0975
AMERICAN CYNAMID CO.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The above-styled cases were brought by plaintiff Coastal Petroleum Company seeking damages for alleged conversion by the several defendants. The State of Florida has been joined as an involuntary plaintiff. Jurisdiction is present under 28 U.S.C. §1332 because of diversity of citizenship of the parties.

Coastal holds a lease from the State of Florida entitling it to the mineral, oil and gas rights in state sovereignty lands underlying the Myakka,

Manatee, Little Manatee, Alafia, Caloosahatchee, and Peace Rivers. Coastal and the State of Florida (the "plaintiffs") contend that the defendants have wrongfully conducted phosphate mining operations on state-owned sovereignty lands covered by the lease to Coastal and that the defendants are therefore liable for conversion. The defendants, in turn, claim ownership of the disputed water bottoms because the rivers flow through lands conveyed to the defendants' predecessors in title by deeds from the Internal Improvement Trust Fund of the State of Florida and patents from the federal government. Apparently, none of the conveyances from the state or the federal government contains any specific reference to submerged lands.

In the view of Coastal and the State of Florida, resolution of the issue of conversion will necessitate a

factual inquiry into the ownership of the lands mined by the defendants. The plaintiffs assert that if a parcel of land was submerged beneath a body of water that was navigable when Florida was admitted to the Union in 1845, then that land has remained state sovereignty land held in trust for the public and cannot have been validly deeded away. The defendants respond that as a consequence of the decisions in Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977), and Burns v. Coastal Petroleum Co., 194 So.2d 71 (Fla. 1967), the complex factual inquiry suggested by the plaintiffs is unnecessary.

By order dated September 15, 1978, this court directed the parties to brief the legal questions involved in Odom and Burns and their application to the present cases. These issues are

presently before the court for determination.

I. Odom v. Deltona Corp.

Odom involved a dispute between the Deltona Corporation and the State of Florida over ownership of certain small, non-meandered lakes of less than 140 acres apiece. Deltona claimed ownership because the lakes were wholly contained within the bounds of properties which Deltona owned "under various chains of title originating either in U.S. Patents or deeds of the Trustees [of the Internal Improvement Fund] of land acquired by the state under the Swamp and Overflow Lands Grant Act of September 28, [1850]." No reservations of the lakes to public use or ownership were contained in the grants. The State contended the lake beds were under navigable waters and therefore were held by the

state in trust for the public. The Supreme Court of Florida affirmed the trial court's ruling that the lands in question were owned by Deltona, not the state.

Defendants contend that "under the several doctrines announced and reaffirmed in Odom v. Deltona," consideration of whether the lands contested here were sovereign in character in 1845 is irrelevant. These "doctrines" are (1) certain constitutional and statutory presumptions described in the trial court's opinion; (2) legal estoppel; and (3) equitable estoppel. Defendants expressly disavow any reliance at the present time on a fourth ground for decision in Odom--the Florida Marketable Record Title Act, Florida Statutes §712.01, et seq.

A. Constitutional and Statutory Presumptions

The trial court in Odom discussed at length the provisions of Article X, §11 of the Florida Constitution and Florida Statutes §§197.228, 253.12(1), and 253.151.[1] All of these enactments deal in some way with navigable waters or sovereignty lands; excepted from their scope are all lands previously alienated or conveyed into private ownership. Defendants here contend that the Florida Constitution and the statutes discussed in Odom recognize that once a conveyance of land by deed has been made, the State of Florida no longer has a claim to that land on the basis of its sovereignty status. Thus, the argument goes, the lands at issue in the present cases have been alienated into private ownership,

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[1] As the plaintiffs point out, Florida Statutes §§197.228(2) and 253.151 have no application whatsoever to the issues in the present litigation, because they do not deal with rivers.

as is shown by the deeds and patents to defendants' predecessors in title.

As the trial court in Odom noted, the constitutional and statutory provisions relied upon by defendants "are not legislative conveyances of trust properties." 341 So.2d at 984. They merely recognize that any submerged lands that have been validly conveyed into private ownership are not still to be considered sovereignty lands. Id. None of them provides a clue as to which submerged lands in the state have been conveyed, and before they can come into play in the present litigation, it first would have to be demonstrated that the contested properties have in fact been deeded away by state or federal authorities.

Although the deeds and patents of record indicate that the uplands surrounding the rivers involved here were

conveyed to defendants' predecessors in interest, the so-called "public trust doctrine" precludes the assumption that the rivers also thereby passed into private ownership. The public trust doctrine derives from the common law of England, which held that the Crown, as sovereign, retained title to the beds of all navigable waters in trust for the benefit of the public. Shively v. Bowlby, 152 U.S. 1 (1894); Broward v. Mabry, 50 So. 826 (Fla. 1909); Martin v. Busch, 112 So. 274 (Fla. 1927). The chief purpose of the public trust doctrine is to ensure that navigable waters and the lands beneath them will not be sold or otherwise allowed to pass into private ownership, thereby depriving the public of their use for navigation, fishing and other common purposes. Shively v. Bowlby, supra; State v. Black River Phosphate Co., 13 So. 640 (Fla. 1893). All lands

beneath navigable waters which are held in trust are known as "sovereignty lands." See Martin v. Busch, supra.

Application of the doctrine mandates that state sovereignty lands "cannot be wholly alienated." State ex rel Ellis v. Gerbing, 47 So. 353, 356 (Fla. 1908). The Florida courts have recognized, however, that, where the public interest would be served, certain conveyances of sovereign land can be made. As expressed by the Florida Supreme Court early in this century:

> A state may make limited disposition of portions of [sovereign] lands, or of the use thereof, in the interest of the public welfare, where the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired. The states cannot abdicate general control over such lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the

> use of them for the public good.

State ex rel. Ellis v. Gerbing, supra, at 355. See also Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775, 786 (Fla. 1956).

The basic principles of the public trust doctrine are now incorporated into the Florida Constitution:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, . . . is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Florida Constitution, Art. 10, §11.

Concomitant to the public trust doctrine is the rule of strict construction of governmental land grants and deeds. "[A] grant in derogation of sovereignty must be strictly construed in

favor of the sovereign." Trustees of Internal Improvement Fund v. Claughton, supra, at 786. See also State v. Black River Phosphate Co., 13 So. 640, 650 (Fla. 1893). The right of a private party to ownership of lands below the high water mark "would be such an unusual and extraordinary one that it should be particularly shown and claimed when sought to be made available in a suit." Williams v. Guthrie, 137 So. 682, 685 (Fla. 1931); Brickell v. Trammell, 82 So. 221, 227-28 (Fla. 1919); Martin v. Busch, supra, at 284.

Additionally, a conveyance by the sovereign of uplands does not include a conveyance of lands below the line of ordinary high water unless both the authority and the intent to convey such lands is clear. Shively v. Bowlby, supra; Martin v. Busch, supra. Thus, a grantee of state-owned lands takes with notice

that the conveyance extends only to the high water mark and does not include sovereignty lands. Odom v. Deltona Corp., supra, at 988; Martin v. Busch, supra, at 285-86.

As noted previously, the determination of the sovereign or non-sovereign character of any parcel of land depends upon whether it lies under navigable waters. The issue of navigability is essentially a factual matter; as the Florida Supreme Court explained in Odom v. Deltona, supra, "[n]avigability at law is generally a question of navigability in fact." 341 So.2d at 988. See also Bucki v. Cone, 6 So. 160, 161 (Fla. 1889). While there are several standards of navigability, Florida has adopted what is known as the "federal title test," Odom v. Deltona, supra, at 988, which holds "that whether a river is navigable in fact is to be determined by inquiring

whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Baker v. State, 87 So.2d 497, 498 (Fla. 1956).

Determination of whether a body of water was meandered is helpful in deciding the issue of navigability. "In Florida, meandering is evidence of navigability which creates a rebuttable presumption thereof. The logical converse of this proposition . . . is that non-meandered lakes and ponds are rebuttably presumed non-navigable." Odom, supra, at 988-99.

The foregoing discussion reveals why the constitutional and statutory provisions applied in Odom do not foreclose the claims made here by Coastal and the State of Florida. Unlike the

lakes and ponds in Odom, the rivers involved in the present cases have not been determined to be non-navigable. Thus, defendants' title to the neighboring uplands does not in itself give them any claim to lands lying below the ordinary high water mark; title to all sovereignty land is impliedly reserved to the state, and the grantee of uplands takes with notice that the conveyance does not pass title to trust properties.[2] Martin v. Busch, supra. Thus, the factual

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[2] The concept of notice of navigability was not utilized in Odom because the lakes involved there were so small as not to put the owner of neighboring uplands on notice that they might be navigable. Indeed, such lakes would not commonly be used as "highway[s] for commerce," Baker v. State, supra, at 498, since it would in all probability be easier to go around them than to go across them. Rivers, on the other hand, often extend long distances and are far more likely to be used for commercial purposes, because if they are sufficiently broad and deep they provide natural conduits for trade and transportation.

question of navigability remains. Although all parties appear in agreement that the disputed rivers were meandered only for relatively short distances near the Gulf of Mexico, this circumstance gives rise only to a rebuttable presumption of non-navigability. Odom, supra. Plaintiff and the State of Florida are entitled to present evidence, as they say they are prepared to do, showing that the presumption is unwarranted and that the rivers are navigable-in-fact.

The doctrine of legal estoppel, or estoppel by deed, is also unavailing to defendants. This doctrine is defined in Florida in the following manner:

> Legal estoppel or estoppel by deed is defined as a bar which precludes a party to a deed and his privies from asserting as against others and their privies any right of title in derogation of the deed, or from denying the truth of any material fact asserted therein. In other

> words, legal estoppel contemplates that if I execute a deed purporting to convey an estate or land which I do not own or one that is larger than I own and I later acquire such estate or land, then the subsequently acquired land or estate will by estoppel pass to my grantee.
>
> Legal estoppel or estoppel by deed is determined by the intention of the parties as expressed in the deed. Whether or not legal estoppel may be applied in a given case is dependent entirely on the language used in the deed or which appears on the face of the instrument.

Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98, 102 (Fla. 1961). Estoppel may be applied against the state or its subdivisions where necessary to prevent "manifest injustice" to private persons. Lobean, at 102; Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775 (Fla. 1956).

Lobean involved a Murphy Act conveyance by the Trustees of submerged tidal land in 1946. In 1956 the Trustees

proposed to sell the property already conveyed to Lobean. Suit was filed to enjoin the Trustees from selling the land, and the Trustees answered by alleging the deed to Lobean was invalid because the property was sovereignty land, the title to which remained vested in the Trustees. The Florida Supreme Court held the state was legally estopped to deny the validity of its conveyance to Lobean. Significantly, the court noted that the sovereignty lands covered by the deed were lands which the Trustees were statutorily authorized to sell. 127 So.2d at 103.

Legal estoppel was also applied in Odom, the court stating, "If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to rights

specifically reserved in such conveyances." 341 So.2d at 989. Crucial to the application of legal estoppel in Odom was the fact that the lakes in question were non-navigable and that the underlying lands thus were not sovereign in character. Consequently, there was no question of the authority of the Trustees to convey them into private ownership, the court more than once speaking of "valid federal and state grants of title" and "lawfully executed land conveyances." 341 So.2d at 989. (emphasis supplied.)

The existence of lawful authority to convey plainly distinguishes Lobean and Odom from the instant cases. Unlike Odom, it has not yet been determined whether the lands in dispute are non-sovereign and therefore indisputably capable of conveyance to private parties. If sovereign, it is evident that the

Trustees were wholly without authority to alienate them until 1969, a date subsequent to the conveyances to defendants' predecessors in interest.[3] The state may not be estopped by the unauthorized acts of its officers. Dade County v. Bengis Associates, Inc., 257 So.2d 291 (Fla. 3d D.C.A. 1972); Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So.2d 517 (Fla. 1st D.C.A. 1971).

There is another, perhaps even more compelling reason why the Trustees' deeds cannot work an estoppel against the State of Florida. The deeds contain no indication that the state intended to convey title to sovereign lands. Estoppel by deed, as indicated in Lobean, "is determined by intention of the parties

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[3] See Florida laws Ch. 69-308 (1969), which for the first time vested the title to navigable fresh water lakes, rivers and streams in the Trustees of the Internal Improvement Trust Fund.

as expressed in the deed." 127 So.2d at 102. Here, the deeds are silent as to whether a conveyance of sovereign title is intended. It is clear, however, that under the public trust doctrine the intent to alienate trust property must be clearly stated. Martin v. Busch, supra. Consequently, the lack of any reference to submerged lands in the deeds from the state to defendants' predecessors in interest negates any possible inference that these lands were meant to be conveyed. Estoppel by deed is therefore inapplicable.

C. Equitable Estoppel

The question of equitable estoppel requires little discussion at present. Like legal estoppel, equitable estoppel may be applied against the state. Lobean, supra. According to Lobean,

> Equitable estoppel as applied to land titles is a different thing [from estoppel by deed]. It depends on the conduct of the parties for its efficacy. It is not conversed with the language of the instrument and may actually deny the legal effect of the deed. In Florida Land Investment Co. v. Williams, 1928, 98 Fla. 1258, 116 So. 642, 643, this court said:
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> "An equitable estoppel, as affecting land titles, is a doctrine by which a party is prevented from setting up his legal title because he has through his acts, words or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience."

117 So.2d at 102.

Since inquiry into the actions of acquiescence of the party sought to be estopped is essential to its application, equitable estoppel cannot be imposed as a matter of law. Whether a party is estopped depends upon the facts and circumstances of the particular case. Terrell v. Weymouth, 13 So. 429 (Fla. 1893).

Accordingly, a ruling as to the applicability of equitable estoppel is inappropriate at present and must be deferred until such time as a full factual record can be presented.

II. Burns v. Coastal Petroleum Co.

The defendants contend that the decision of the Florida First District Court of Appeal in Burns v. Coastal Petroleum Co., 194 So.2d 549 (Fla. 1967), cert. denied, 201 So.2d 549 (Fla. 1967), cert. denied, 389 U.S. 913 (1967), bars Coastal and the State of Florida from claiming a lengthy portion of the Peace River as sovereign land. Burns involved a dispute between Coastal and the Florida Trustees of the Internal Improvement Fund over whether the water bottom of Lake Hancock in central Florida fell within the terms of Drilling Lease No. 224-B as modified, the same lease from the

Trustees to Coastal which forms the basis for Coastal's claim here. The issue was solely one of construction of the lease instrument. The court concluded that, since Lake Hancock was not one of the bodies of water specifically named in the lease, the submerged lands covered by the lease did not include those lying beneath Lake Hancock.

The following passage appears in the Burns opinion:

> It is admitted that Lake Hancock is not mentioned in any of the lease documents but is a sovereign body of navigable water meandered by the government and within the jurisdiction of the Trustees. It is also admitted that Lake Hancock is the headwater of Peace River and flows through natural channels into the Gulf of Mexico. Lake Hancock does not flow directly into Cohanzy Creek which flows into Peach Creek which empties into Peace River. The southern portion of Peace River, from its mouth northward to the line between Townships 38/39, is meandered and within the jurisdiction of the Trustees. However, Peace

> River north of Township 38/39 is not meandered and does not belong to the State. That is, Peace River for a distance of 40 miles south of Lake Hancock is in private ownership. (emphasis supplied)

194 So.2d at 74. Defendants claim that since both plaintiff and the State of Florida were parties to Burns, they should be bound by the determination that the Peace River north of the line between Townships 38 and 39 is privately owned and collaterally estopped to re-litigate this question.

In a diversity action state law governs the applicability of the doctrine or collateral estoppel. See Breeland v. Security Insurance Co., 421 F.2d 918 (5th Cir. 1969); Annotation, State or Federal Law as Governing Applicability of Doctrine of Res Judicata or Collateral Estoppel in Federal Court Action, 19 ALR Fed. 709, § 3(a), and cases cited therein. The general rules relating

to collateral estoppel in Florida are set out in Mobile Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977):

> Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction.

354 So.2d at 374.

For at least two reasons collateral estoppel cannot be applied in this case. First, the parties are not identical to those in Burns. Although both Coastal and State of Florida were parties to Burns, the defendants were not.

Second, it is clear that the question of state ownership of the Peace River north of Townships 38/39 was not

an issue in Burns and thus was not "fully litigated and determined." As noted above, the only question on appeal was whether Lake Hancock was included within the terms of Coastal's mineral lease. Neither navigability nor sovereign ownership of the river was directly presented as an issue. The statement of the court concerning private ownership of a portion of the river was mere dicta, since it was not necessary to the question of construction of the lease.[4] State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 826 (Fla. 1973).

ORDER

It is ORDERED AND ADJUDGED:

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[4] Additionally, it is now obvious, after Odom, that the Burns court's conclusion was erroneous as a matter of law. A lack of meandering creates a rebuttable, not a conclusive, presumption of non-navigability.

1. The rulings made above concerning Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977), and Burns v. Coastal Petroleum Co., 194 So.2d 71 (Fla. 1st D.C.A. 1967), shall govern the further course of this litigation.

2. On or before February 1, 1979, counsel for all parties shall submit proposed agenda for the conduct of further discovery in these cases.

DONE AND ORDERED this 10th day of January, 1979.

/s/ William Stafford
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

103-1

APPENDIX E
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 81-6083, 81-6094,
81-6153 and 81-6154.

COASTAL PETROLEUM COMPANY, a Florida Corporation, and The United States Army Corps of Engineers, The State of Florida Department of Natural Resources and The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Plaintiffs-Appellees,

v.

U.S.S. AGRI-CHEMICALS, A DIVISION OF UNITED STATES STEEL CORPORATION, a Delaware Corporation authorized to do business in Florida,

Defendant-Appellant,

COASTAL PETROLEUM COMPANY and The State of Florida Department of Natural Resources and The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Plaintiffs-Appellees,

v.)

INTERNATIONAL MINERALS)
& CHEMICAL CORPORATION,
)
Defendant-Appellant,)

COASTAL PETROLEUM COM-)
PANY, a Florida Corpora-
tion,)

Plaintiff-Appellee,)

The State of Florida,)
Department of Natural
Resources, etc., et al.,)

Involuntary)
Plaintiffs-Appellees,)

v.)

W.R. GRACE & COMPANY,)
a Florida Corporation,)

Defendant-Appellant.)

COASTAL PETROLEUM COM-)
PANY, a Florida Corpora-
tion,)

Plaintiff-Appellee,)

The State of Florida)
Department of Natural
Resources,)

Involuntary)
Plaintiffs,)

v.)

SWIFT AGRICULTURAL CHEMICALS CORP., a Delaware corporation, authorized to do business in Florida, now Estech General Chemicals Corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Florida

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Jan. 17, 1983

Before HILL and HENDERSON, Circuit Judges, and GARZA, Senior Circuit Judge:

JAMES C. HILL, Circuit Judge:

I.

This is a consolidated appeal of four cases. Defendants are appealing the propriety of an injunction issued by the district court, and that court's conclusion that subject matter jurisdiction existed. For the reasons stated below we reverse.

HISTORY

The basis of this case is a title dispute involving a complex procedural history which we will only briefly summarize. In 1976, Mobil Oil Corporation [hereinafter Mobil] filed suit in a Florida State Court seeking a declaration of its rights under an oil exploration agreement it had with Coastal Petroleum Company [hereinafter Coastal]. Coastal filed several counterclaims including one alleging Mobil's conversion of phosphate ore from certain rivers in Florida. Coastal, was joined in its counterclaim, by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida and the Department of Natural Resources[1] [hereinafter collectively

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[1] The Board of Trustees was merged into the Department of Natural Resources in 1975 by Florida Statute, chapter 75-22. Since then the legislature has made

referred to as Trustees].

Mobil filed a reply counterclaim seeking a declaration of the parties' rights based upon an 1862 deed granted by the Trustees to Mobil's predecessor in interest which raised the issue of the navigability of certain waters in Florida that were in dispute. Based upon Mobil's counterclaim, Coastal and the Trustees removed the action to federal court asserting federal question jurisdiction. Coastal's and the Trustees' allegation of federal question jurisdiction is based upon the contention that Mobil's reply counterclaim raised the issue of whether the Peace River was a navigable body of

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it clear that the Trustees are still a viable independent agency, holding title to certain lands and having the authority to control those lands. Laws of Florida Ch. 79-255 § 1 (1979). It is clear from the legislative history that the merger took nothing away from this agency and was undoubtedly effectuated for administrative convenience.

water. Their position derives from the State's acquisition of Peace River and the lands beneath it back in 1845 when Florida was admitted to the Union. If, at the time of the statehood, the Peace River was navigable, then the lands passed from the United States to Florida as sovereign lands under the equal footing doctrine.[2] If the state received these lands as sovereign lands, then, according to Coastal and the Trustees, the 1862 deed leasing these lands to Mobil's predecessors in interest was invalid. Whether the Peace River was navigable on the

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[2] The equal footing doctrine states: "the new States . . . have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." Mumford v. Wardwell, 6 Wall. (73 U.S.) 423, 18 L.Ed. 756 (1867). According to Pollard's Lessee v. Hagan, 3 How. (44 U.S.), 212, 11 L.Ed. 565 (1845), under the equal footing doctrine, upon admission to the Union, new States acquire title to the lands underlying navigable waters within their boundaries.

date Florida was admitted to the union, according to Coastal and the Trustees, presents a substantial federal question. The appellees argue that the passing of title is a federally created right which should be governed by federal law.

Mobil, however, contends that the Peace River was not navigable at the time of statehood, and therefore, the lands did not pass to Florida as sovereignty lands. Mobil suggests that Florida received the lands in 1850 under the Swamp and Overflow Lands Grant Act, 9 Stat. 520, codified at 43 U.S.C. § 982 (1976). Accordingly, Mobil maintains that its reply counterclaim does not raise the issue of the navigability of the Peace River, but rather a typical title dispute between Florida land claimants, each of whom derived its claim from the State. Because this is only a title dispute concerning Florida law,

there should be no federal question jurisdiction.

Prior to any determination by the district court as to the viability of Coastal's and the Trustees' claim of federal question jurisdiction, Coastal filed suits, similar to its conversion suit against Mobil, against five other mining companies four of which were based on both federal question[3] and diversity of citizenship[4] jurisdiction. The five

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[3] 28 U.S.C. § 1331(a) (1976) provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[4] 28 U.S.C. § 1332(a) (1976) provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--(1) citizens of different states. . . .

mining companies were: American Cyanamid Company, USS Agri-Chemicals, Estech General Chemical Corporation, International Minerals and Chemical Corporation and W.R. Grace and Company.

Coastal's new contention of diversity of citizenship was based on its belief that the Trustees, although an agency of the State, were sufficiently independent from the state as to qualify them as a citizen. If the Trustees are a citizen of the state of Florida, then complete diversity exists entitling them to subject matter jurisdiction in the federal court. Subsequent to Coastal's initiation of the suits in federal court, four of the six mining companies initiated quit title actions in the Florida state court system. Coastal then sought and obtained an injunction issued from the district court which extended to all six mining companies, enjoining all part-

ies from instituting any lawsuit, in state or federal court, involving any of the issues to be considered in the conversion suits. Mobil and American Cyanamid Company appealed the issuing of the injunction to the Eleventh Circuit and both companies have succeeded in dissolving the injunction as it pertains to them.[5]

The remaining four defendants are challenging the propriety of the same injunction issued by the district court and are appealing that court's conclusion of the existence of subject matter jurisdiction.

FEDERAL QUESTION JURISDICTION

The district court's order

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[5] Mobil Oil Corp. v. Coastal Petroleum, 671 F.2d 419 (11th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 300, 74 L.Ed.2d 281 (1982); Coastal Petroleum v. American Cyanamid Co., 673 F.2d 1343 (11th Cir. 1982).

concluding that federal question jurisdiction existed was issued prior to this court's opinion in Mobil Oil Corporation v. Coastal Petroleum Company, 671 F.2d 419 (11th Cir. 1982). In Mobil, where the identical title disputes were raised, this court concluded that the "question of title to land which depended upon whether state land was subject to restrictions on alienation did not present a federal question merely because the issue of whether the river was navigable was involved. . . ." Id. at 424.

Because we have concluded that federal question jurisdiction did not exist in Mobil, we also conclude that there is no federal question presented as against the remaining four mining companies. Although Coastal attempts to assert other reasons upon which federal question jurisdiction exists, we find the arguments without merit.

DIVERSITY JURISDICTION

For purposes of diversity jurisdiction a state is not a citizen of any state. Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 15 S.Ct. 192, 39 L.Ed. 231 (1894); see C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure: Jurisdiction § 3602 n.13 (1975). Whether the Trustees are considered a "State" for purposes of diversity, or whether they qualify as a separate and independent agency is the threshold question. If the Trustees are considered part of the State so that they are not a "citizen" within the meaning of § 1332, then complete diversity would not exist. See Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267, L.Ed. 435 (1806).

This court, in Aerojet-General Corporation v. Askew, 453 F.2d 819 (5th Cir. 1971), resolved the question of

whether the Trustees qualify as being sufficiently independent to be considered a "citizen" for purposes of diversity jurisdiction. In Aerojet, suit for specific performance was brought against the Trustees and the Florida State Board of Education. The court, after examining Florida law, and in determining whether the Board could rely on the eleventh amendment state immunity doctrine, concluded that "this suit does not constitute an action against the State of Florida and is, therefore, not barred by the eleventh amendment to the United State Constitution, as to either of the two state boards in question." Id. at 830, see Farrugia v. Askew, 371 F.Supp. 736 (N.D. Florida 1973). Although the determination made by the court in Aerojet concerned eleventh amendment immunity, we conclude that the analysis for determining the Board's status as a "citizen"

for the purposes of diversity is the same. The court in Aerojet relied heavily on the fact that the appropriate Florida statutes had vested title to the land in question with the Trustees. Similarly, in the instant case, title of the land in dispute has been vested with the Trustees.[6]

The district court used a multi-factor analysis in holding that the Trustees are sufficiently separate and independent from the state so as to confer "citizen" status upon them. These factors have been approved by this circuit and are as follows: (1) whether the agency can be sued in its own name; (2) whether the agency can implead and be impleaded

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[6] Florida Stat. § 253.12(1) states: "Except submerged lands heretofore conveyed by deed or statute, the title to all sovereignty tidal and submerged bottom lands . . . and all submerged lands owned by the state . . . is vested in the Board of Trustees of the Internal Improvement Fund."

in any competent court; (3) whether the agency can contract in its own name; (4) whether the agency can acquire, hold title to, and dispose of property in its own name; and (5) whether the agency can be considered a "body corporate" having the rights, powers and immunities incident to corporations. See C.H. Leavall and Co. v. Board of Commissions of Port of New Orleans, 424 F.2d 764 (5th Cir. 1970); Central Stikstof Verkoopkantor, N.V. v. Alabama State Docks Department, 415 F.2d 452 (5th Cir. 1969). Because the state has vested title of the land in the Trustees and because the Trustees have acted and continue to act as a separate and distinct entity from the state, we hold that the trustees are a citizen within the meaning of diversity jurisdiction under 28 U.S.C. § 1332 (1976).

THE INJUNCTION

Having established that jurisdiction exists, we turn to the merits of this case, the issuance of an injunction. Under the anti-injunction statute: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdictions, or to protect to effectuate its judgments." 28 U.S.C. § 2283 (1976). The district in granting the injunction stated:

> At this stage of the litigation . . . it would be imprudent to have the same issues litigated in state courts; the issue should be tried one time by one court in order to save both time and expense and avoid duplicitous litigation. No party should be allowed to circumvent this court's rulings by filing quiet title actions in state court. The court determines that an injunction is necessary in aid of its

jurisdiction.

The anti-injunction statute has been interpreted very narrowly by the Supreme Court.[7] According to the Fifth Circuit, the phrase "where necessary in aid of its jurisdiction" "should be interpreted narrowly, in the direction of federal non-interference with orderly state proceedings." T. Smith & Sons, Inc. v. Williams, 275 F.2d 397, 407 (5th Cir. 1960). This court has clearly stated that an "action may be proved simultaneously in state and federal court and the federal court cannot enjoin the state even if the federal suit was filed first." Carter v. Ogden Corp., 524 F.2d 74, 76 (5th Cir. 1975).

The district court, in issuing

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[7] See Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d (1972); Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

the injunction had concluded that federal question jurisdiction existed. Based upon this conclusion, the court desired not to have the same issues litigated both in state and federal court particularly when there was a substantial federal question being raised. We have not concluded that there is no federal question. This case now comes into the federal court based solely upon diversity of citizenship. We, therefore, reverse the district court's issuing of the injunction.

The issues now remaining in the Coastal suit involve questions dependent entirely upon state law. Under the Erie doctrine, when a federal court is adjudicating rights created by the state, based solely on diversity of citizenship, the federal court, in effect, becomes just another state court for the purposes of determining the outcome of

the case.[8] Accordingly, the district court, in this instance, would now be compelled to apply state law in the same manner as the state court. Therefore, there is no longer any compelling need for federal jurisdiction and no compelling need for the court to issue an injunction to protect is jurisdiction. Whether the injunction would have been proper assuming federal question jurisdiction existed is not an issue presently before this court and therefore, we do not reach the merits of this question.

Coastal and the trustees contend that the district court also issued the injunction to effect or protect its judgment. The appellees argue that there was a final judgment in this case in need of protection. Their contention

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[8] See Guaranty Trust Co. v. York, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1944); see also C. Wright, Federal Courts § 55 256 (3d ed. 1976).

is based on the district court's order of January 10, 1979. This order resulted from the appellant's request that an early ruling on special legal issues be granted by the court. Appellants put forth several defenses which they asserted would resolve many of the issues, citing Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977) as precedent. The court reviewed the briefs submitted by all parties and concluded that several of the defenses raised by the appellants were without merit. The court ordered its ruling pertaining to these defenses to govern the rest of the litigation.

This order is simply a non-appealable interlocutory order. To fit into the "protect and effectuate judgment" exception, the order must be a final judgment. See International Association of Mechanics and Aerospace Workers v. Nix, 512 F.2d 125, 129-33 (5th Cir. 1975).

The word "judgment" is defined as "any order from which an appeal lies." Federal Rule Civil Procedure 54. According to Southern Methodist University Association v. Wynne and Jaffe, 599 F.2d 707 (5th Cir. 1979),

> 28 U.S.C. § 1291 empowers the courts of appeal to hear "appeals from all final decisions of the district courts." Generally, this means "all decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Southern Methodist, 599 F.2d at 711 citing Coopers and Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

An early order given prior to trial, eliminating certain defenses, does not constitute a final judgment within the meaning of § 2283. This order has not eliminated the need for a trial on the merits nor has it resolved many of the remaining factual and legal ques-

tions.

Because we find that the issuing of the injunction does not fall within any of the recognized exceptions to the Anti-Injunction statute, we conclude the district court abused its discretion and we reverse, dissolving the injunction.

REVERSED.